# Between deterioration and disposability: mitigating the impact of Covid-19 on children with special educational needs and disabilities in England

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Special educational needs and disabilities (SEND)–Covid-19–Coronavirus Act 2020–children's rights

*With the legal framework governing the provision of services for children and young people (CYP) with special educational needs and disabilities (SEND), namely the Children and Families (CFA) Act 2014, subject to ongoing scrutiny, review, and reform, this article argues that little real reflection has been given to why the system is so broken in the first instance. In arguing that CYP with SEND were disproportionally and adversely impacted by the Covid-19 pandemic, this article offers a critical evaluation of the legislative and policy changes enacted pursuant to the Coronavirus Act 2020, and the wider rights-deficient context in which those momentous legal changes were implemented, which enabled the dilution of the legal rights of this already vulnerable cohort of CYP. By drawing further on original empirical evidence adduced from an online survey of 234 parents and carers of CYP with SEND, this article further highlights the detrimental de facto impact which Covid-19 exerted on CYP and their families, which was exacerbated by such changes. By drawing together both strands of analysis, this article contends that greater adherence and implementation of the Children and Families Act (CFA) 2014 is needed more than ever to secure the legal entitlements of CYP with SEND.*

**Introduction**

In the context of the provision of services for children and young people (CYP) with Special Educational Needs and Disabilities (SEND), we are in a historically significant time. Governmental acknowledgment that CYP with SEND and those educated in alternative provision, feel unsupported and that their educational outcomes fall far behind those of their non-SEND peers,1 in addition to the recognition that 'too many parents are navigating an adversarial system, and face difficulty and delay in accessing support for their child',2 casts a prominent spotlight on the legal rights of CYP with SEND and their families. The Government responses to these challenging realities are outlined in the reforms suggested in both their 2022 White Paper3 and Send Review,4 with the comments of the former Education Secretary that: 'Every child has the right to excellent education – particularly those with special educational needs and disabilities, who often need the most support' appearing in a press release for the latter.5

Acknowledging that this is set against a backdrop of pandemic disruption and 'learning loss' for many, especially disadvantaged and vulnerable children,6 the White Paper titled *Opportunity for all: strong schools with great teachers for your child* is wide-ranging, proposing changes to how schools are managed and run, the length of the school week, the standards pupils should achieve in English and maths, and many other areas.7

Additionally, the Send Review was a response to the widespread recognition that the system was – and is – failing to deliver for CYP and their families. The review proposed to: (i) establish a new national SEND and alternative provision system, setting nationally consistent standards for how needs are identified and met at every stage of a child's journey across education, health and care; (ii) create new local SEND partnerships bringing together education, health and care partners with local government to produce a local inclusion plan setting out how each area will meet the national standards; (iii) support parents and carers to express an informed preference for a suitable placement by providing a tailored list of settings, including mainstream, specialist and independent; (iv) introduce a standardised and digitised EHCP (Education, health and care plan) process and template to minimise bureaucracy and deliver consistency; and (v) streamline the redress process to make it easier to resolve disputes earlier, including through mandatory mediation, whilst retaining the tribunal for the most challenging cases.8

Not long after these reform proposals, a House of Lords Children and Families Act 2014 Committee reported on the operation of the Children and Families Act (CFA) 2014,9 itself the central legislative axis around which the legal provision of children's SEND services occur. In its seminal report entitled: *Children and Families Act 2014: A Failure of Implementation*, the Committee reported that the 2014 legislation:

'has ultimately failed in meaningfully improving the lives of children and young people. Instead, it has largely sat on the shelf, a piece of legislation which has languished as a result of a lack of implementation, inadequate scrutiny and incessant churn amongst Ministers and officials. All this has been allowed to occur while children and young people continue to suffer through public service failures including poor SEND services, increasing mental health referrals waitlists and creeping delays in family courts.'10

Therefore, against this context, the entire legal architecture governing the provision of SEND services for CYP, and their families, is instituted upon objectively feeble legal foundations. In this paper we argue that the aforesaid suggested reforms have come at a time where there has been little real reflection as to why the system is broken in the first instance, and why this vulnerable group of CYP were so adversely impacted by the Covid-19 pandemic. Indeed, the Government's newly pledged commitment to the education, health, and social care rights of CYP with SEND must be received somewhat sceptically, given that one of the first public health emergency measures enacted by the Government in England in response to Covid-19 was the formal diminution of those very rights.11 Whilst there have been numerous public surveys and responses detailing the impact of the pandemic on CYP with SEND and their families,12 little (if any) attention has focused on the legislative and policy changes enacted pursuant to the Coronavirus Act (CVA) 2020 which enabled the dilution of those rights, nor the manner in which those momentous legal decisions were made.

This article, in addressing this lacuna, examines these legislative changes and argues that the Covid-19 pandemic not only exposed the frailty of the legal architecture underpinning the rights of CYP with SEND within the English education system, but amplified such weaknesses. By examining the formal governmental response to CYP with SEND, which included the legal downgrading of their rights during the pandemic, in conjunction with an empirical study we undertook surveying 234 parents and carers of CYP with SEND, this article highlights the detrimental impact which Covid-19 exerted on CYP and their families. We further contend that greater adherence to, and implementation of, the CFA 2014 is needed if this legislation is to ever achieve its 'aim of improving the lives of children and families, particularly the most vulnerable children and young people in society'.13

This article is divided into four sections: the first sets out the legal and policy landscape prior to Covid-19, which includes an articulation of what is meant by the term 'SEND' and its prevalence among CYP in England.14 We then examine the legal and policy responses which were enacted as a response to Covid-19 pursuant to the CVA 2020, which impacted the education, health, and social care rights of CYP with SEND in England. We argue that the legislative changes which were enacted without either a Children's Rights Impact Assessment (CRIA), nor an Equality Impact Assessment (EIA) under the Equality Act 2010, represented a disproportionate and regressive interruption in the enjoyment of CYP's legal rights. Next, we proceed to examine the *de facto* impact of Covid-19 on CYP's SEND rights, by drawing on empirical evidence collected from 234 parents of CYP with SEND in England which was collated in 2020 during the first lockdown and which was used as evidence before the Government Education Committee on the impact of Covid 19 on CYP with SEND and their families. We argue that, unless robust evidence-based strategies are now implemented to facilitate recovery and feed into reform proposals, the pandemic (and its aftermath) possesses the capacity to exert a long-term degenerative impact on CYP with SEND. Finally, we set out our arguments that as we continue to recover and reflect on the lessons learned from the pandemic, and consider reforms to the SEND system following the White and Green Papers, and the conclusions from the HL Select Committee on the CFA 2014, that the rights-based protections within the CFA 2014 must be further strengthened and implemented, as opposed to undermined, to ensure that the rights of CYP with SEND are not divested of their substantive and procedural traction.

**Legal and policy framework prior to Covid-19**

Prior to outlining the legal and policy responses that were enacted in the aftermath of the Covid-19 pandemic, it is necessary to assess the landscape as it previously existed. This serves two overarching functions. First, it highlights the enormity of the pre-existing rights-deficit culture which existed within education, health, and social care, coupled with the systemic weaknesses which already underpinned the delivery of CYP's SEND services in England. Secondly, it provides an evidential canvas against which to assess the proportionality and reasonableness of the subsequent legislative and policy enactments which were introduced in response to Covid-19.

**Children and young people with SEND in England**

In England, the term 'special educational needs' (SEN) was first incorporated into law under the Education Act 1981. This 'represented an attempt to establish a new legal classification for children for whom the standard educational provision would not be adequate'.15 The CFA 2014 now currently provides that a child or young person has special educational needs if he, or she, has a learning difficulty or disability which calls for special educational provision to be made for him or her.16 Section 20(2) CFA 2014 states that:

'A child of compulsory school age or a young person has a learning difficulty or disability if he or she—

(a)     has a significantly greater difficulty in learning than the majority of others of the same age, or

(b)     has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.'

Additionally, many children and young people who have a SEN may also have a disability under the Equality Act (EA) 2010 and thereby activate the protections it too affords. Thus, the term 'SEND' is an amalgamation to reflect that CYP may possess both a SEN and a disability and therefore the term is commonly used within this field of law and policy. The EA 2010 states that a person has a disability if they have 'a physical or mental impairment that has a “substantial” and “long-term” negative effect' on their ability to carry out normal daily activities.17 For these pupils, 'reasonable adjustments'18 must be made to ensure that they are not at a substantial disadvantage. As noted by Ofsted in 2021: 'Despite these official definitions, research highlights the varying interpretations and practices across professionals, schools and local authorities for identifying SEND'.19 Indeed, research carried out by Smith et al20 into the practice of school exclusions in England, which itself disproportionally affects CYP with SEND, found that just under 40 percent of the 1,600 teachers surveyed admitted that their school had informed staff about the requirements arising under the EA 2010, with another 40 percent stating that they did not know of them, which led to the author's concluding that 'the Act's requirements have not been adequately communicated to classroom teachers'.21 Further research by JUSTICE, an all-party law reform and human rights organisation, found that the law relating to school exclusions was 'not always fully understood by schools',22 and that for children with SEND, this often resulted in the misinterpretation and misapplication of the requirements of the EA 2010. Indeed, the most recent government figures reported in 2022 state that pupils with SEND are five times more likely to receive a suspension or permanent exclusion than pupils with no known SEND.23 More widely, such findings evince an incoherent, if not chaotic, application of the legal protections afforded under the EA 2010, the consequence of which deprives children of their legal entitlements.

In terms of prevalence, children with SEND in England in 2021/22 accounted for 15.8 percent of all school pupils in the state-funded education system, which equates to around 1.4 million CYP.24 Where it is deemed that special educational provision is needed for a child or young person with SEND up to the age of 25 and there has been a formal Education and Health Care Needs assessment, 'the LA must secure that an EHC plan is prepared for the child or young person' and 'once an EHC plan is prepared, it must maintain the plan'.25 In 2020/21, the percentage of pupils with an EHC plan had increased to 3.7 percent.26 The percentage of pupils with SEN but without an EHC plan (SEN support) was 12.2 percent in 2020/2021, which again is symptomatic of an increasing trend. Amongst those pupils with an EHC plan however, the most common primary type of need in 2021 was Autistic Spectrum Disorder (ASD), which was present in 30 percent of all pupils with an EHC plan.27 Furthermore, 50 percent of pupils with an EHC plan were reported as being educated in state-funded mainstream schools, 41 percent in state-funded special schools, seven percent in independent schools, and one percent in state place-funded alternative provision.28

CYP with SEND undoubtedly represent one of the most vulnerable population cohorts within the English education system and consistently endure comparably higher rates of school exclusions29 and decreased employment opportunities in comparison to their non-SEND peers.30 On the specific issue of school exclusions, research has consistently affirmed the debilitating and subjectively adverse impact that a school exclusion has on the excluded child.31 Daniels and Cole argue that a permanent exclusion from school constitutes a precursor to wider societal exclusion,32 while McCrae et al remind us of the increased statistical correlation between school exclusions on the one hand and poor academic progress, social exclusion, teenage pregnancy, unemployment, homelessness, and imprisonment on the other.33 CYP with SEND are disproportionately exposed to these realities. Compounded by increasing evidence of a parallel system of unofficial, or illegal, school exclusions which unduly affects children with SEND,34 the vulnerability of these CYP within the English education system is unequivocal.

**The legal landscape prior to the Covid-19 pandemic**

The provision of services for CYP with SEND in England is currently governed by Part 3 of the CFA 2014. Introduced as a means to consolidate service provision for CYP with SEND, this landmark legislation was enacted 'to effect cultural and systemic change within the area of SEND and education; specifically, the development of an aspirational and outcome-based system for individuals with SEND'.35 It partly responded to Brian Lamb's inquiry in 2009, which painted a devastating picture of the state of SEND provision in England and which called for a 'radical overhaul' of the SEND system.36 In concluding that urgent action was required 'to ensure we do not let a generation of children leave school ill-equipped to lead an independent life and make a contribution to society',37 Lamb further proposed 'a radical recasting of the relationship between parents, schools and local authorities to ensure a clearer focus on the outcomes and life chances for children with SEN and disabilities'.38 The CFA 2014 therefore signified a clear governmental commitment to reforming the delivery of children's services across a number of important areas, including education. Significantly, Part 3 replaced the old system of 'Statements of Special Educational Needs' with new, all-encompassing EHC plans. The CFA 2014 was further supplemented by a new SEND Code of Practice39 to guide and frame these legislative changes.

EHC plans differ from their predecessors by the inclusion of health and care needs,40 and comprise a statutory document which delineate the nature and extent of service provision required to meet the EHC needs of the CYP concerned. Crucially, from an enforcement perspective, section 42(2) of the CFA 2014 prescribes an absolute duty on local authorities (LAs) to arrange the provision as set out in an EHC plan.41 Further underpinned by CYPs' participatory rights, section 19 of the CFA 2014 mandates LAs to respect such rights within the EHC planning process. This includes the provision of necessary information to enable that participation occurs and to support CYP's development to enable them to achieve the best possible outcomes in life, whether that be educational or otherwise.

The Special Educational Needs and Disability (SEND) Regulations 2014 (SI 2014/1530) (the Regulations) also set out a number of important timeframes within which LAs must comply with their legal obligations pursuant to the CFA 2014. These include the duty to communicate the decision not to assess a child for SEND to be made within six weeks from the date of the EHC assessment request, the duty to communicate the decision not to provide an EHC plan following an assessment to be made within 16 weeks from the date of the request, and should an EHC plan be necessary to meet the needs of the child, the LA must send the finalised plan to the child's parents, the young person, and the school named within the plan within 20 weeks from the date of the assessment request. Such timelines not only ensure legal and procedural certainty, but also reflect the importance for CYP with SEND to have their needs provided for in a timely and predictable manner. This safeguards their educational well-being and reduces any prospective deterioration in their health and education which would likely occur within an indeterminate system.

However, despite the legislative intent of the CFA 2014 and its accompanying Regulations, the provision of SEND services for CYP has been inconsistent and unreliable. The House of Lords Select Committee tasked with comprehensive post-legislative review of the CFA 2014, reported in 2022 that there has been a failure in its implementation.42 Even more damningly, the Committee reported that 'the Government was well aware of its failings but had not taken any action to address them'.43 Prior to this, investigations by the House of Commons cross-party Education Committee concluded that the SEND framework was characterised by confusion, unlawful practices, bureaucratic nightmares, buck-passing, a lack of accountability, inadequate resources and an overly adversarial process for parents.44 Similarly, investigations into SEND provision at the localised level within one region in the north-west of England unveiled systemic issues involving delay, unquantified EHC plans, evidence of immense personal and familial stress for parents accessing SEND provision on behalf of their children, instances of illegal school exclusions affecting children with SEND and a broader systems-wide failure in communicating with parents in an honest and transparent manner.45 Moreover, research by Neville Harris and Gail Davidge, which involved 21 interviews from a range of stakeholders in the field of SEND law and policy, noted that the CFA 2014 had failed to engender 'a major shift towards the increased agency of children and young people'.46 They also concluded that little evidence existed within the SEND system which indicated that 'navigation has been eased for parents in the way that was intended, nor that the participation of children and young people has been greatly enhanced'.47 Similarly, research by Riddell et al concluded that despite the implementation of rights affirming legislation in the field of SEND law and policy, both in England and Scotland, much work remains to be done to 'support children and young people to participate at a meaningful level in formal decision making contexts, including dispute resolution and school choice'.48

Evidence of dissatisfaction with the system is also reflected in the increased number of appeals to the First-tier Tribunal (SEND), which hears appeals from individual families against a range of LA decisions concerning EHC plans, and discrimination claims against schools or LAs due to a child's disability.49 Tribunal data from 2020/2021 reveals that the First-tier Tribunal upheld LA decisions in only 168 of 4,825 hearings in 2020–21, a success rate of just 3.6 percent. Keer noted that:

'Across the seven full academic years since the SEND reforms became law, SENDIST panel hearings have upheld just 7% of local authority decisions, in 26 out of every 27 cases that make their way to a SENDIST hearing, those decisions are found to be flawed . . . [T]here is no other part of the public sector where decision-making is revealed to be this flawed, this often, on an industrial scale, with no accountability, year after year after year.'50

That the current SEND system remains deeply flawed is further supported by Ofsted, who in 2021 noted significant weaknesses within the system, including gaps in external provision and training, lack of coordination between services and a lack of accountability and weak co-production.51 Such evidence further indicates the emergence of an implementation gulf between the legal requirements contained within the legislative framework and their subsequent application, the consequence of which undermines CYP's rights. Undoubtedly, the acknowledgement of this has led to the publication of both the Government's Green and White Papers and the House of Lords Select Committee's report which concluded that the CFA 2014 represents a failure of implementation.52 What is clear, however, is that at present, and in the years preceding the pandemic as we outline below, there has been an ever-increasing decline in the standards and level of SEND provision for CYP in England.

**Legal and policy response post Covid-19**

Against the precarious state of children's SEND rights in England, we argue that the closure of schools in England on three separate occasions during 2020–21, and the legislative changes enacted under the CVA 2020 in response to the pandemic, doubly impacted CYP with SEND and their families. Through the enactment of primary and secondary legislation, the UK government formally altered and substantially diluted the legal entitlements affecting the education, health, and social care rights of CYP with SEND in England. Despite international warnings that Covid-19 was likely to disproportionally impact CYP with disabilities,53 in addition to the collective advisory guidance issued through various UN human rights treaty monitoring bodies, including the UN Committee on the Rights of the Child54 and the UN Committee on the Rights of Persons with Disabilities,55 both of whom endorsed a human rights-based response to Covid-19, such directives were clearly not followed by the government in England. Rather, the legislative response was disproportionate, retrogressive, and incompatible with children's rights obligations.

**The CVA 2020**

The CVA 2020 received Royal Assent on 25 March 2020, having been fast-tracked through Parliament in just four sitting days.56 Enacted as a response to mitigate the impact of Covid-19, it covered a wide array of legal and policy areas which affected CYP. However, Hidalgo et al note that it was 'quickly drafted, barely debated, and largely agreed to across the benches'.57 In the context of SEND law and policy, its impact on CYP was demonstrably detrimental. On 28 April 2020, the Secretary of State for Education issued the relevant notification as required under para 5 of Sch 17 of the CVA 2020 to modify section 42 of the CFA 2014.58 From 1 May 2020 to 31 July 2020, the absolute legal duty conferred upon LAs to deliver the special educational and healthcare provision as set out in a child's EHC plan under section 42 of the CFA 2014 was modified to a 'reasonable endeavours' duty to secure that provision. This relaxation was intended to balance the pressures that LAs and health and social care professionals were under with the relevant guidance stating that 'what constitutes reasonable endeavours will vary according to the needs of each child and young person and the specific local context'.59 As noted by the Children's Commissioner at the time, the term 'reasonable endeavours' lacked specificity and left it in the hands of LAs and care commissioning groups (CCGs) to determine what was reasonable, given their particular circumstances. Indeed, in her oral evidence before the House of Commons Education Committee on the 'Impact of Covid-19 on education and children's services', Amanda Batten, Chair of the Disabled Children's Partnership, stated that the reasonable endeavours duty created 'such a low bar legally'60 that it did not 'leave parents with a lot of scope to negotiate'.61 Subsequently, the House of Commons Women and Equalities Committee, in their report titled 'Unequal impact? Coronavirus, disability and access to services: Interim Report on temporary provisions in the Coronavirus Act', described the duty as a 'nebulous concept, which has been inconsistently interpreted and poorly understood by some local authorities'.62 The introduction of the 'reasonable endeavours' duty thus made it extremely difficult to hold LAs accountable for their legal obligations regarding the provision of services for CYP with SEND and further exacerbated the 'postcode lottery' within SEND provision.63 Consequently, CYP with SEND went without some of their most vital services which were fundamental to their education and healthcare needs, with many of them subsequently unable to adapt or adjust to home education.

We argue that the Government decision to modify the law was unnecessary and concerning for three principal reasons. First, the decision to amend s 42 of the CFA 2014 occurred in the absence of the government undertaking a children's rights impact assessment (CRIA), to envisage the likely impact such a measure would have on the rights of an extremely vulnerable cohort of children. CRIAs provide an evaluative backdrop against which to assess the likely effect of a proposed legislative, budgetary, regulatory, or administrative measure on the commitment of states to adhere to their children's rights obligations.64 They therefore represent a critical procedural mechanism to foreground children's rights within government decision-making. However, in their examination of the effectiveness of CRIAs as a means of strengthening children's rights, Neville Harris and Sheila Riddell observe that they have been subject to certain critique, including their predisposition to treat all CYP as a homogenous group. They further observe that CRIAs, to date, have tended 'to use the language of consultation, rather than participation, suggesting a lack of critical engagement with a wide range of children and stakeholders'.65

However, by failing to undertake a CRIA prior to the alteration of section 42 of the CFA 2014, the proportionality, rationality, and reasonableness of the alteration elided official scrutiny. Given that such an assessment would have arguably and reasonably engaged with the pre-existing evidence base surrounding the existing precarity of prevailing SEND services for CYP in England, the failure to conduct such an assessment expelled the consideration of children's SEND rights beyond the outer margins of government decision-making, into an opaque inconsequential sphere. Indeed, an examination of the official notifications issued on both 28 April 2020 and 28 May 2020 to justify the legal alteration of section 42 are entirely bereft of any allusion to children's rights. Rather, the initial defence of the measure as outlined within the first notification, was justified by reference to the inevitable staffing and resource constraints generated by Covid-19, while the proportionality of the alteration was justified by reference to the assumed enabling effect it would have on LAs and health bodies to adapt to the needs of their specific areas and permit them to use reasonable alternatives to the provision of services.66 Similar justifications underpinned the enactment of the second notification, although the Department for Education further stated that 'children and young people with EHC plans are expected to attend education settings where it is determined, following risk assessment, that their needs can be as safely, or more safely met in the educational environment'.67 Although government guidance further stated that such risk assessments should 'incorporate the views of the child or young person',68 no substantive advice was issued regarding how LAs should involve children and/or their parents or carers' in these assessments, or within what timeframe they should have taken place.

Considering the Department's own admission that LA staffing and resource issues were a direct contributory factor occasioning the dilution of the legal duties owed to CYP with SEND, the reasonableness and viability of the Department's advice pertaining to risk assessments is itself called into question. In view of reduced human resources, the question arises as to how LAs were to carry out such assessments in the first instance, which simultaneously should have involved CYP within their design and execution. This was further reflected within the Government's Covid-19 *Recovery Strategy* which further envisaged that children in receipt of EHC plans should have their education continued in school during the pandemic.69 However, despite such rhetoric, the evidence gathered as part of our empirical study (detailed in the next section) during the first lockdown revealed that out of the 234 respondents who participated, 89.5 percent reported that no risk assessment (that they were aware of) had been carried out for their child, thereby demonstrating a negligible, if not nullifying uptake of the government's own stated guidance for LAs. The failure to carry out such risk assessments meant that CYP with SEND were denied important educational, health and social care provision, the corollary of which was inimical to their overall development and well-being.

Moreover, the failure to subject the legal modifications of section 42 of the CFA 2014 to a CRIA must also be viewed in parallel with the broader failure to subject the CVA 2020 itself to a CRIA. Given its swift enactment, 'having been fast-tracked through Parliament in four days',70 the CVA 2020 received limited parliamentary inspection, such that important and necessary procedural and human rights concerns evaded proper analysis. It has since been argued that the Government 'used and maintained its numerical and procedural dominance to minimise the extent to which Parliament could challenge, scrutinise, and seek to exert its own authority in respect of the CVA 2020'.71

In contrast, its Scottish counterpart, the Coronavirus (Scotland) Act 2020, was subject to a children's rights and well-being impact assessment (CRWIA)72 with additional coronavirus related legislation also subject to a CRWIA. This included the Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 which introduced changes around LA decisions regarding school placing requests and subsequent appeals and to relax and extend the procedural requirements underpinning such appeals to account for Covid-19. Admittedly, the Scottish CRWIA acknowledged its own limitations through its failure to engage directly with the evidence base regarding the impact such measures would have on specific groups of children, in addition to acknowledging its failure to ascertain the wishes and views of children themselves.73 Notwithstanding such limitations, an independent CRIA was undertaken in Scotland by a group of children's rights experts at the request of the Scottish Children and Young People's Commissioner between 11 May and 19 June 2020.74 It found that although children's rights 'were far from a central feature'75 of government decision-making, 'the value of the CRIA process was demonstrated when new health guidance was changed, after intervention by the Commissioner, so that it became more rights compliant'.76 By shining a spotlight firmly on the rights of CYP, the independent Scottish CRIA demonstrated the ability of a rights-affirming measure to exert real policy change so that CYP's rights could be more readily adhered to.

Secondly, the downgrading in England of the absolute legal duty within section 42 of the CFA 2014 to that of 'reasonable endeavours' occurred without any clear articulation of the legal parameters within which the new duty was to operate. What is clear, however, is that the 'reasonable endeavours' duty represented the lowermost legal obligation within the lexicon of public law duties and reflected a crude minimalist approach to the realisation of CYP's SEND rights. Indeed, efforts to replace 'reasonable endeavours' with the duty to take 'all practicable steps' were rejected during parliamentary debate which would have arguably ensured that the legal downgrading of children's SEND rights would have retained some legal bite. As noted by the Children's Commissioner at the time:

'This would have set the bar higher. For example, it would not have absolved LAs or CCGs of their duty to provide an alternative service to a child because the cost is higher – in contrast, cost is a factor which can be taken into account when determining what is “reasonable”.'77

While the guidance accompanying the modification of section 42 reiterated the need for LAs to avoid 'blanket policies'78 regarding the SEND provision to be secured or arranged for the CYP within their area, it failed to refer to, or embed, important children's rights principles to guide such approaches. With principles such as the welfare of the child,79 the child's best interest's principle,80 or even the recognition of the importance of SEND provision for children's overall educational, health and social development absent from the guidance, the 'reasonable endeavours' duty failed to even feign adherence to the most rudimentary of children's rights standards. Nor indeed did the guidance elaborate on how children's participatory rights pursuant to section 19 of the CFA 2014 were to be realised, or what contingency arrangements LAs were expected to adopt and implement to secure such participation.81

However, in theoretical and practical terms, the 'reasonable endeavours' duty still mandated LAs to adopt an individualised approach to SEND provision for every CYP with an EHC plan to determine how their individual needs could be provided for. Problematically, what constituted 'reasonable endeavours' remained subjectively opaque, with the guidance stating that LAs must have considered their specific local circumstances, including their workforce capacity, the needs of and specific circumstances of the CYP concerned and the views of the child, young persons and their parents regarding the provision of services.82 However, with no concrete stipulation of how such considerations were to be operationalised and accounted for, the duty lacked obvious compellable force. This was compounded further by the fact that any challenge pertaining to alleged failures to comply with the duty, and which would have impacted the child's education rights, would likely have fallen within the parameters of a challenge under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 2 of Protocol No 1 (A2P1) (the right to education). However, regional and domestic case-law has long affirmed the narrow judicial construction which has accompanied the right to education.83 From its earliest construal in the *Belgian Linguistics Case*,84 it became apparent that the requirements of A2P1 were to be negative in nature. In this instance, the Strasbourg Court held that A2P1 included a right of access to existing educational establishments and the right to an effective, but not *the* most effective, education. Domestically, such an approach has been consistently replicated, and the case of *A v Essex County Council (National Autistic Society intervening)*,85 was one of many which shone a spotlight on the legal limitations of A2P1.86 Here, the Supreme Court found no breach of A2P1 on account of the delay of the state, for a period of 18 months, to find a suitable educational establishment for a severely autistic boy with both incontinence and epileptic difficulties. In upholding the negative application of education as contained in A2P1, the court emphasised that the interpretation of the right is governed by the prevailing education system within a particular contracting state. In further referring to the 'enormous' costs associated with providing education for a disabled child, Lord Phillips stated that:

'It is plainly highly desirable that a State should make provision for the educational needs of those who are disabled, but the signatories to A2P1 did not commit themselves to establishing educational facilities that did not exist in their countries.'87

Similarly, in her analysis of the domestic application of A2P1, Lucinda Ferguson argues that it 'provides only weak protection'.88 This reflects what Lord Bingham previously stated in the seminal case of *A v Head Teacher and Governors of Lord Grey School*,89 where, in reaffirming the narrow legal protections afforded by A2P1, he stated that the right is 'a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the State'.90

Therefore, the dilution of section 42 created a curious and adverse legal paradox, for whilst it attenuated the obligations of LAs to deliver on their obligations towards CYP with SEND, it simultaneously amplified the procedural and substantive legal hurdles that CYP and their parents/carers would have to surmount, to challenge any purported breach of education rights arising from the reduced modified duty.

Lastly, the legal dilution of section 42 raises broader human rights considerations regarding whether the measure itself constituted a retrogressive enactment. While human rights law permits, albeit within securely confined parameters,91 a retrogression in the existent levels of rights enjoyment within a state, which includes the right to education, such measures must be temporary, necessary, proportionate, reasonable, non-discriminatory and must not disproportionally impact the rights of marginalised groups.92 Acting as a legal brake against retrogressive measures, the principle of non-retrogression represents a critical safeguard for ensuring the continued realisation of children's (and human) rights. Thus, by targeting a distinct group of CYP for a readily renewable period of time in circumstances, which directly affected their education and health rights, and where the proportionality of the measure was predominantly justified by reference to staffing and resource issues, as opposed to its impact on the rights of the CYP with SEND themselves, the permissibility criteria for enabling such retrogressive measures becomes increasingly difficult to rationalise. Indeed, given the pre-existing vulnerabilities which characterised the SEND system in England, coupled with the absence of any CRIA on its likely effect on an already vulnerable group of CYP, we argue that the measure was not only disproportionate but also demonstrably retrogressive.

**The Special Education Needs and Disabilities (Coronavirus) Regulations 2020**

In addition to the foregoing, further changes to the SEND legal framework were implemented by the introduction of the Special Needs and Disabilities (Coronavirus) Regulations 2020, which came into force on 1 May 2020. These modified four sets of regulations relating to SEND provision including: the Special Educational Needs and Disability Regulations 2014; the Special Educational Needs (Personal Budgets) Regulations 2014; the Special Educational Needs and Disability (Detained Persons) Regulations 2015; and the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) Regulations 2017. Remaining in force until 25 September 2020, the 2020 Regulations relaxed the time periods pertaining to EHC planning processes, assessments, direct payments, and annual reviews with all usual timeframes regarding LA obligations modified to 'as soon as reasonably practicable'. For example, the customary timeframe within the SEND Regulations 2014 which states that LAs must complete EHC plans within 20 weeks of the LA receiving a request for an assessment was modified to 'as soon as reasonably practicable'. The guidance accompanying the Regulations stipulated that such changes only applied on an individuated basis where the circumstances of a particular case deemed it impossible, on account of an incidence of, or transmission of Covid-19, to follow the usual timescale.

In practice, this meant further delay for CYP with SEND in accessing vital supports. This was concerning in view of the existing evidence which indicated that LAs were often not meeting the statutory timescales for assessing and preparing EHC plans as mandated under the CFA 2014. For example, in 2018, just 60 percent of new EHCPs were issued within the 20-week limit – a decrease from 65 percent in 2017,93 while evidence from the Local Government and Social Care Ombudsman (LGSCO) reported delays in some instances of up to 90 weeks, and regularly more than a year.94 Therefore, due to the suspension and relaxation of these statutory timescales, CYP with SEND faced even longer delays before they could access support. While the changes in the Regulations objectively pertained to extending the timing applicable for the discharge of LA duties across several important SEND areas, the absence again of any reference to children's rights principles, or indeed to how LAs operationalised or adhered to what was 'reasonably practicable', exposed the legal chasm within which such changes resided.

Against this legal backdrop, the impact of Covid-19 on both the rights of CYP with SEND, and their families, becomes apparent. As the succeeding section highlights, the empirical data we gathered during the first lockdown in May 2020 reveals that Covid-19 exerted a devastating impact on CYP with SEND, the effects of which have arguably augmented in light of two subsequent lockdowns, and which should now inform all post-Covid-19 recovery processes and any subsequent reform.

**The impact of Covid-19: an empirical analysis**

**Research methods**

This section analyses the results from an online survey which was completed by 234 parents of CYP with SEND between 15 April 2020 and 15 May 2020, the aim of which was to ascertain the impact which the Covid-19 pandemic was having upon their children's education, health, care, and well-being. Ethical approval for this investigation was granted by the University Ethics Committee in early April 2020 and the results represent a snapshot in time of a continuously evolving and complex situation regarding the provision of SEND services for an already vulnerable group of CYP.

Out of the 234 parents who completed the survey, 229 were from England, four were from Wales and one from Scotland. Given that education law and policy, including SEND, is a devolved competency under the UK's constitutional arrangements, with each region possessing their own legislative schemes for SEND provision,95 the focus in this paper is on the impact of Covid-19 on CYP with SEND in England. As such, the results enunciated below contain a margin of error of 2.1 percent to reflect the participation of those falling outside the jurisdictional remit of the English legislative framework. Whilst online survey data collection possesses the benefits of enabling access to hard-to-reach populations, in addition to being relatively time and cost free,96 they also entail the dangers of bypassing participants who do not possess access to online platforms, or who perhaps have limited technological proficiency.97

**Research results**

Overall, the parental responses within this investigation involved 234 CYP. The respondents came from a geographically diverse range of LAs from right across the country and thus represented a broad research sample. The LAs included Surrey, Sussex, Hampshire, Liverpool, Trafford, Cardiff, Cambridgeshire, Southwark, Flintshire, Bristol, Manchester, Bury, Isle of Wight, West Sussex, Sefton, Cheshire, Essex, Dudley, Wirral, Sheffield, Haringey, Ealing, Staffordshire, Derbyshire, Durham, Brighton and Hove, London Borough of Harrow and Northumberland. Nine respondents indicated that they had two children with SEND, while one respondent revealed that they had three children with SEND. The age range of the CYP involved spanned from 3–20 years, while the average age was 10.6 years. The majority (55.3 percent) of the CYP were educated in mainstream schools, while 33.6 percent were educated in specialist schools, 0.5 percent were home educated, 0.9 percent were attending either alternative provision or a pupil referral unit. 11.1 percent were educated in 'other settings', which, given the vast age ranges of those covered within the study, it is likely that these 'other settings' encompassed nursery and post-16 institutions.

The range of SEND that the CYP possessed was varied, complex and often multiple in nature, with autism accounting for 53 percent of the responses. Other needs and disabilities included sensory processing disorder, dyslexia, profound multiple learning disability, ADHD, violent and challenging behavioural issues, and complex physical disabilities, to name but a few. The prevalence of autism, however, is in keeping with its statistical dominance among CYP who nationally possess an EHC plan. At the time of the completion of the survey, approximately 74.5 percent of the respondents stated that their child already had an EHC plan. However, parental satisfaction from within this cohort of respondents in relation to their child's EHC plan was varied and mixed. While 53.8 percent of the respondents indicated an overall satisfaction with their child's EHC plan, 21.9 percent conveyed dissatisfaction with it. Reasons underpinning this unhappiness revolved around concerns regarding the specification and quantification of the provision within the plan. Responses included:

'No . . . not specific or quantifiable. Outcomes not SMART.'

'No – lacks specificity and is not adhered to . . . '

'No . . . provision is not specific or quantified. There is also no provision for speech and language therapy or Occupational therapy.'

Additionally, 20.2 percent of the respondents stated that their child's EHC plan needed to be reviewed and updated, that they were awaiting an assessment, or that their application was currently under appeal. Therefore, it is important to state that at the outset of the Covid-19 pandemic, a significant number of parents had expressed concerns regarding the content of their child's EHC plans or were in the process of either updating or reviewing their child's plan, or waiting for an assessment to be carried out to determine whether their child required a plan. Thus, for this cohort of parents and CYP, their rights were directly impacted by the formal legal changes as outlined in the preceding section and the relaxation of the legal duties referred to above.

**Lack of official contact**

With the advent of school closures following the onset of the Covid-19 pandemic, the survey sought to ascertain the extent of the educational provision that children with SEND had received since the closure of the schools, the frequency of contact between the school/educational provider and the parent/carer of the child with SEND, and furthermore, whether the LA had been in contact with the parent/carer regarding their child/children's education.

In response to the above issues, one of the principal findings from this investigation was the discernible disparity in the level of official communication that parents received from either the LA itself, or from their CYP's educational provider. Despite government guidance which emphasised the importance of inter-agency and collaborative interaction between LAs and educational providers regarding the need to ensure an appropriate level of continuity and clarity regarding the education of CYP with SEND, the evidence from this investigation revealed a notable disjuncture between rhetoric and reality. Despite LAs being 'asked to work with educational settings and parents or carers to determine whether children and young people would be able to have their needs met at home and be safer there than attending an educational setting',98 the evidence adduced from this investigation revealed that 94.9 percent of the respondents had no contact whatsoever from their LA and a further 89.9 percent revealed that despite their child possessing an EHC plan, no SEND risk assessment was carried out that they were aware of, as per government advice. This lack of contact also possesses the capacity to further undermine parental confidence in the ability of LAs to discharge their obligations, which, given the well-documented lack of trust that has typified the parental/professional relationship pertaining to children with SEND,99 the failure to communicate with parents amidst an unprecedented crisis signified a regressive step on the part of LAs. At a time when education, health and social care services were significantly disrupted, the need for communication was amplified, not lessened.

In addition to the failure by LAs to communicate with parents, the evidence further demonstrated that the level of communication between the child or young person's educational provider and their parents was variable and inconsistent. In some instances, contact was non-existent. Overall, 14.7 percent of the respondents reported no contact at all, 13 percent reported daily contact, 42 percent reported weekly contact, 2.1 percent reported fortnightly contact, while 22.5 percent reported contact as falling into the category of 'other'. Although schools were operating under entirely altered circumstances, the failure to communicate with parents of CYP with SEND signified a clear departure from the guidance enunciated within the Code of Practice and its overwhelming emphasis of parental involvement,100 which includes the need for schools to provide an annual report to parents on their child's progress,101 the need for schools to communicate with parents regularly to set clear outcomes for their child's progress,102 and the need for parental involvement and discussion regarding important transition points in the child's life, including their preparations for adulthood.103

Communication failures are also inimical to the role of the Special Educational Needs Co-Ordinator (SENCO) within schools, who have 'day-to-day responsibility for the operation of SEN policy and coordination of specific provision made to support individual pupils with SEN, including those who have EHC plans'.104 Previous research has highlighted the constraints within which SENCOs operate,105 including concerns that 'an over-emphasis on attainment could overshadow other areas of need that may affect the child's learning'.106 However, the obligation to co-ordinate provision for CYP with SEND and liaise with parents in such endeavours remains the infusing duty underpinning their important role.107 Research by Curran et al in 2018 into the ability of SENCOs to fulfil their roles (pre-Covid-19) presents a bleak picture of the educational landscape. Specifically, their findings that 74 percent of SENCOs did not have enough time to ensure that CYP with SEND were able to access the supports they needed, and that only 23 percent of them felt that they had enough time to ensure that pupils with an EHC plan accessed the provision they required, point to wider institutional and resource pressures which again reflect the pre-existing implementation flaws which characterised SEND provision prior to Covid-19. Indeed, government guidance that 'SENCOs will typically lead on ensuring that [children] have access to materials they can use to learn, often drawing on other professionals to source or adapt online learning that addresses a child or young person's special educational needs',108 did not appear to have translated into practice in light of the evident communication disparities adduced within this investigation. While evidence of good practice existed in that many respondents noted daily and weekly contact, further research has confirmed the detrimental impact which the above adduced fragmentation and discontinuity of communication has had on children's learning outcomes.109

**Inconsistent provision of education**

Closely connected with the variable communication levels as outlined above, the evidence further revealed an inconsistent approach to the provision of education following the initial closure of the schools on 20 March 2020 for CYP with SEND (lockdown 1). Of the responses received, 46.9 percent indicated an overwhelming level of dissatisfaction with the education provided. This varied from instances where no provision at all was provided, to situations where the work was too generic, not differentiated, and not specific to the needs or abilities of the child concerned. Responses included:

'None. My daughter usually has full-time 1:1 support in school to access a differentiated curriculum and social/behavioural/emotional targets.'

'None. No support, no phone calls nothing. I teach him myself.'

'Work is set once a fortnight for the entire year group on a 2-page pdf document. Some tasks have some websites linked many don't work or are paid for ones. Absolutely no SEND support/ provision/ differentiation/ acknowledgment at all.'

While again, evidence of good practice was uncovered in that 48.2 percent of the respondents replied in generic terms about the level of provision their child was receiving, this tended to delineate the nature of the provision itself, with most of it happening online, or having been posted home. However, within this parental cohort, evidence of express satisfaction with the level and type of the continued education was evident. Responses included:

'Brilliant school has provided lessons for home.'

'Good support, work pack sent home, chrome book which is great but stumbling across issues as work set. School phones regularly.'

However, the percentage of respondents noting dissatisfaction with the level of provision warrants scrutiny, considering the emphasis which the SEND Code of Practice places on differentiated learning, itself a crucial aspect to securing any special educational provision a child may require pursuant to s 21 CFA 2014, or indeed to meet the outcomes specified in a child or young person's EHC plan. Indeed, specific reference is made to the need for 'differentiated' approaches to learning and teaching in five separate sections within the Code of Practice itself.110 Roy et al argue that 'differentiated instruction involves varying content, process and product according to student's abilities, interests, and learning styles',111 while Storgilos et al remind us that 'effective inclusion occurs when teachers modify the curriculum to the needs of all students'.112 From a children's rights perspective, the UN Committee on the Rights of the Child has been clear that under the United Nations Convention on the Rights of the Child 1989, and in the context of children's disability rights, domestic education policies should be designed to respond to the needs of the individual child concerned.113 Thus, in view of the accepted centrality which differentiated approaches to learning serve in the context of disabled children's education, the lack of differentiation which parents in this investigation have noted will have negatively affected CYP with SEND and their educational progress. In the longer term, this will require updated needs assessments to be carried out to determine the exact levels of regression which have occurred and what future provision will be required.

Indeed, when schools returned from the lockdown in the autumn of 2020, Ofsted reported that in the context of SEND provision, not all schools and colleges were delivering a full curriculum.114 Based on evidence from education, health and social care leaders and practitioners between 1 September and 4 December 2020, they reported that CYP with SEND were less likely to be attending their schools and colleges than their non-SEND peers.115 OFSTED further concluded that 'these changes may mean that some children and young people with SEND are missing out on learning that is essential for their preparation for adult life'.116 This will have a clear impact on progression, attainment and the overall educational and social well-being of CYP with SEND. However, it is also important to emphasise that the pre-lockdown persistent absence rates were disproportionally higher for children with SEND, in comparison to their non-SEND peers. Figures from the Department for Education for the 2018/19 academic year indicate that 'pupils with a SEN statement or education healthcare (EHC) plan had a persistent absence rate of 24.6 percent – more than two times higher than the rate for pupils with no identified SEN (9.0 percent)'.117 It is therefore arguable that the impact of lockdown has had a disproportionately regressive effect on CYP with SEND, given that they previously experienced higher rates of school absenteeism.

**Impact on children's physical, social and mental health**

The evidence clearly indicated that from very early on, Covid-19 was having a detrimental and injurious impact on the physical, social, and mental health of CYP with SEND. Of the 229 responses received on the question of the wider impact of Covid-19, only 12.2 percent of the respondents answered somewhat positively, stating that either their child's anxiety had reduced, or that their happiness had improved by staying at home. This of course raises the connected issue of why schools in the first instance are spaces of anxiety, or unhappiness. This, however, is beyond the remit of this article's investigations. However, such responses must be considered within the context-specific circumstances that parents and children found themselves in. One respondent indicated that she was able to teach her child as she was qualified in British Sign Language (BSL) and despite her son's education provision not being differentiated, he was 'academically bright with good literacy skills'.

However, most respondents (87.8 percent) provided compelling evidential accounts of deterioration, regression, and backsliding regarding their children's overall educational, health and social well-being. Declining mental health, increased anxiety, social regression, behavioural breakdowns and a cessation of essential health and therapeutic services were recurrent themes within the responses received. These paint a bleak outlook for the future well-being of an already vulnerable group of CYP across multiple sectoral areas. Responses included:

'Behaviour is terrible – very violent to self and others, no routine, regressed in food aversion, not sleeping, refusing to get dressed and washed, very controlling. I can't do housework or anything with my other child or she has a meltdown.'

'He is suicidal and deeply disturbed. He doesn't really understand what is happening. The LA don't care at all. His college are being brilliant but the LA are now threatening to take away all the remaining Social Care for YAs in (LA area) and reallocate it to old people in nursing homes – at the minute we still have 2 days a week of a sort of sc . . . losing that will tip him over the edge. I'm frantic.'

With the pandemic directly impacting the health services that CYP with SEND routinely required and accessed, the redeployment of NHS staff to deal with Covid-19 patients resulted in a drastic reduction in the availability of therapies and community support which were not deemed critical. This meant many children were not receiving vital health services that they required, including mental health support, occupational therapy, and speech and language therapy, to name but a few. Parents expressed concern about the withdrawal of essential services and its correlative impact on their children's overall health and well-being. Responses included:

'No respite for 4 weeks. No therapies my son usually receives. His mental health has bottomed. No guidance from local authority.'

'It is having a devastating impact, young sibling is being attacked, mental health is suffering, and child has become mute. We've had no support from CAMHS despite self harm. Child has waking day curriculum and should attend a 38 week residential placement, but placement has just closed to pupils.'

'She is missing out on important therapies such as physiotherapy and hydrotherapy. She needs total physical care, 24/7, which we as her parents are having to provide without any assistance.'

The evidence this survey generated from lockdown one and during the early stages of the Covid-19 pandemic, is further reflected in additional research conducted by other organisations. For example, in May 2020, the Disabled Children's Partnership (a major coalition of more than 70 organisations campaigning for improved health and social care for disabled children, young people and their families) examined the impact of Covid-19 and the resultant lockdown on families with disabled children across the UK. Reporting in June 2020, they outlined that more than half (51 percent) of the 4074 survey responses received by parents or carers of disabled children, who were receiving therapeutic or additional support, stated that it had ceased during the first lockdown.118 They further added that 'they felt locked out and abandoned by Government and by society and are fearful for their own physical and mental health'.119

Additionally, feelings of anxiety and apprehension were evidenced within our investigation. Concerns were expressed regarding the likelihood of some children falling further behind in their education and the difficulties they would face upon reintegration. Responses included:

'I'm also worried he will be so anxious he will be unable to attend when school opens. It took us 3 years to get him in class at high school. This does not look good.'

'Re-integration is going to be an enormous struggle.'

'Worried about how much further behind my child will get with no proper support or getting back to the school routine.'

Overall, the evidence presented an unequivocal deterioration in children's educational, health and social well-being. This was corroborative of earlier survey data by Young Minds which revealed that 67 percent out of 1,854 parents surveyed were concerned about the impact of Covid-19 on their children's long-term mental health.120 Whilst this survey was carried out during the early stages of Covid-19, and although all restrictions have now been lifted, the impact of the pandemic on CYP with SEND has nonetheless endured. For instance, when schools reopened after the first lockdown in England in autumn 2020, Ofsted reported that CYP with EHC plans had lower levels of school attendance than all other pupils, with attendance standing at 77 percent as opposed to the national average of 83 percent.121 Thus, it is important that we acknowledge, during this time of recovery, that CYP with SEND are further set apart from their non-SEND peers, by virtue of the difficulties they additionally experienced in transitioning back into full-time education.122 Reporting in the autumn of 2020, OFSTED stated that:

'Although most children and young people with SEND had returned to education, some had found it difficult to return. For example, some residential special school headteachers said that children were struggling to adapt to changes in the school's expectations and environment. Some mainstream school leaders said that they could not use spaces that would normally be available for children and young people with SEND, such as nurture rooms, because of the risk of cross-bubble contamination . . . We also saw evidence that a small minority of children and young people with SEND were at risk of exclusion due to changes in their behaviour after returning to education.'123

Such observations serve as a powerful reminder that the impact of Covid-19 was experienced differently across and within all population groups. For CYP with SEND, the impact was acute and the dilution of their legal rights, alongside the increased pressures which families of disabled children experienced during the crisis, exacerbated the needs of this already vulnerable cohort. As post-pandemic recovery is underway, this already under-resourced and under-funded area of service provision requires significant investment so that CYP with SEND are not left even further behind their peers.124

**Looking forward: a rights-based roadmap**

Thus, in view of the foregoing analysis, and as we begin to reflect on lessons learned and how best to now move forward, the need to arrest the decline in children's educational, health, and social well-being becomes a critical priority. This is not only necessary in the short term, but also to ensure that CYP with SEND are not disproportionally consigned to the long-term uncertainty and lack of opportunity which the withdrawal and dilution of essential services may have generated. Given that such services often encompass direct medical and therapeutic interventions, the need to have foregrounded children's rights as part of the pandemic response becomes apparent. This was echoed by Raman et al, who argue that the long-term consequences of Covid-19 are not only likely to exacerbate existing inequalities on a national and international basis, but that maintaining vigilance for those who are marginalised and with the most to lose, including those with disabilities, is critical.125 Central to this should be respect for, and adherence to, the rights-based framework within the CFA 2014 which seeks to ensure as a minimum, a baseline guarantee of service provision for CYP with SEND in England. Given the formal rolling back on SEND rights which occurred under the CVA 2020, this article, in addition to an ever-escalating evidential mass, highlights the regressive impact which Covid-19 had on CYP with SEND. Moving forward and with the review of the CFA 2014 now concluded, it is imperative any reforms incorporate evidence-based interventions to mitigate the long-term impact of Covid-19 on CYP with SEND and is co-produced with them.

Moreover, the economic argument for investment in children's education and health services is unequivocal. Clarke et al assert that 'early investments in children's health, education, and development have benefits that compound throughout the child's lifetime, for their future children, and society as a whole'.126 However, seductive as it may be to situate the argument for investment within an economic paradigm, CYP with SEND possess the same rights, hopes, and aspirations as their non-SEND peers. Their lives and futures should not be considered, or planned for, against an exclusively reductive monetary metric. As Michael Freeman persuasively reminds us, a society without rights is one which would be 'morally impoverished'.127 However, given the impact which Covid-19 has had on CYP with SEND, we argue that a rights-based approach must inform subsequent legal and policy decisions affecting CYP with SEND. In view further of the parliamentary evidence given by the former Chancellor of the Exchequer that the UK is facing a 'severe recession, the likes of which we have not seen',128 the imperative to protect children's rights and services must become a critical priority. Indeed, if the response to the 2008 financial crisis, which had a devastating impact on children's services domestically129 is a probable indicator of the future directional flow of the measures which will accompany the response to the predicted economic fallout of Covid-19, then children's services, including SEND services, are facing a very uncertain future. It is therefore imperative that historical mistakes are not repeated. Given the minimal traction which children's rights has had to date on the measures thus far enacted in England,130 and considering the empirical evidence adduced within this investigation, several suggestions will now be advanced to ensure children's SEND rights and services are foregrounded within future planning.

First, we argue that the absolute legal duty conferred upon LAs to deliver the educational and healthcare provision set out in a child's EHCP under section 42 of the CFA should never again be diluted to a 'reasonable endeavours' duty. Such an alteration risked nullifying the legal rights of CYP with SEND in their totality. This change in the legal landscape and the inconsistent way in which the new measures were implemented created confusion amongst many families of CYP with SEND about what they are entitled to, and left them with a reduced ability to challenge decisions which were potentially unlawful, alongside uncertainty around how to best meet their child's escalating needs.131 In view further of the proposed governmental changes to the Human Rights Act 1998, which could potentially alter the scope and reach of the positive obligations which public authorities, including LAs, are under, the need to prevent against any future downgrading of children's SEND rights and the means to enforce them, becomes an immediate priority.132 Should future legal modifications become necessary, in light of the human and resource constraints which Covid-19 may once more generate (or indeed future pandemics), such alternations should not divest the legal duty of their enforceability. In this regard, the human rights principles of proportionality and necessity must guide governmental decision-making and must become central considerations in any future legal and policy decisions. As argued by Special Needs Jungle, a non-profit support network for SEND families:

'SEND children's education should not be seen as subject to “flexibility”. It should not be the first thing to be thrown under the bus in an emergency . . . Listen to what's gone wrong . . . And make sure you are prepared for next time.'133

Secondly, if the 2020 SEND Regulations are ever again revoked, they should be reviewed monthly along the same standards to determine their ongoing necessity, with such decisions underpinned by governmental engagement with the evolving evidential base surrounding the impact of Covid-19 on CYP with SEND. As recovery is underway, the Department for Education should ensure that all necessary corrective interventions are now made available to mitigate the impact of Covid-19 on CYP with SEND. LAs should be directed to undertake an evaluation of the number of risk assessments that were carried out, to determine the nature and extent of the level of provision which was provided during the pandemic. This is necessary to assess whether the government advice in the first instance was followed, but also to set the foundations for any updates or revisions which may likely have to be made to remediate and take account of Covid-19 and the impact it has had on CYP with SEND.

Thirdly, we argue, as the HL Select Committee has now concluded its review of the CFA 2014 and the Government has published the long-awaited 'SEND Review' into service provision for CYP with SEND, that children's rights remain at the forefront of all legal and/or policy changes that are implemented in the future. This includes the centralisation of CRIAs within any future changes to the legal and policy frameworks so that children's rights are clearly embedded within decision-making structures in a meaningful and consequential manner. Furthermore, given that children's SEND rights traverse multiple government departments and agencies including health, education, and social care, the need for more targeted, collaborative, and joined-up approaches becomes apparent. In this regard, CRIAs must be carried out in a manner which engages all relevant departments and agencies to avoid what Lisa Payne calls 'the fragmentation of children's policy across various government departments'.134 If lessons are to be learned from the pandemic, it is that children's rights – and human rights more widely – must not be side-lined for the sake of departmental or legislative ease. Moving from central to local government, it is also clear that children's rights must become a more visible operational mainstay within the actions of LAs. Robust training around SEND law, policy, and practice should be provided to all LA staff working within SEND law so that the legal entitlements of CYP with SEND are adhered to as a matter of law and not elective choice.

Moreover, whilst the SEND Review was initially intended to look at how the system has evolved since the legislative reforms were enacted in 2014, the Parliamentary Public Accounts Committee has clearly stated that the review must result in 'concrete action' to address 'significant failings'.135 Whilst many agree that the SEND system needs very significant investment, not all agree that further reform is necessary, but rather what is required is adherence to and compliance with existing legal obligations. For instance, Moore argues: 'What is fundamentally needed is a way to make local authorities and schools follow existing law as set out in the Children and Families Act 2014, the Equality Act 2010, the Children Act 1989 and other key pieces of legislation',136 which echoes the findings of the HL Select Committee, that enforceability of existing legal provisions is where the real problem lies and where attention should now be focused.

**Conclusion**

In conclusion, this article has highlighted how in the context of service provision for CYP with SEND, we are in a historically significant time given the recent flurry of government activity in this area. However, any reforms must take into consideration the impact which Covid-19 has had on CYP with SEND in England. By providing a snapshot in time, our study confirms the findings of other subsequent studies, that Covid-19 exerted a detrimental impact on this group of CYP. This was compounded by the downgrading of their legal rights which weakened their pre-existing legal protections and reduced their ability to pushback against the impact which this had on their education, health, and social well-being. While much more work remains to be done to examine the wider impact of Covid-19 on CYP with SEND, including along important intersectional strands such as race, gender, and poverty, to name but a few, what is clear is that Covid-19 has disproportionally affected some of our most vulnerable and marginalised CYP.

Importantly, as the Government now considers reforming the legal framework governing current SEND provision, it is imperative that children's rights are centralised within all decision-making structures moving forward. Considering further that the legal downgrading of the rights of CYP with SEND was one of the first legislative enactments which occurred as a response to the Covid-19 pandemic, the procedural and substantive legal traction that children's rights law can, and should, exert, must now be deployed in full. For to avoid children's SEND rights ever again becoming disposable legal entitlements, children's rights must become the immovable foundation upon which any subsequent reform(s) or prospective legal and policy decisions are made.

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